85-263 (1)

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JUNE TERM, 1985

ELIJAH MAGGETTE,

Petitioner,

vs.

COOK COUNTY POLICE AND CORRECTIONS MERIT BOARD, ROBERT A. NOVELLE, SAMUEL W. NOLAN, E. JAMES GARBUTT, RICHARD J. ELROD, Sheriff of Cook County, and PHILIP T. HARDIMAN, Executive Director, COOK COUNTY DEPARTMENT OF CORRECTIONS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

ELIJAH MAGGETTE
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Pandick Midwest, Inc., Chicato • 454-7600

QUESTIONS PRESENTED

1. Whether the "selective prosecution" of the petitioner among 970 correctional officers similarly situated was based on the exercise of first amendment rights of free speech or other arbitrary classification.

2. Whether the differences in punishments meted out to the 34 correctional officers, for essentially the same charges and findings, violated equal protection of the law as stated in the Fourteenth Amendment.

3. Whether the petitioner was subjected to unfair, unreasonable, cruel and unusual punishment in being discharged, in violation of the 14th Amendment.

4. Whether the Appellate Court erred in refusing to consider or hold that Maggette and others disciplined, were not entitled to amnesty given to others who also returned to work on January 30, 1980.

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REFERENCE TO REPORTS

The Opinion of the Appellate Court of Illinois, First District, Second Division is reported in cases (not published) 83-2979, 83-2980, 83-2981, 83-3020 consolidated and is appended hereto at pages App. 1 through App. 22. The order of the Supreme Court of

Illinois denying Petition for Leave to Appeal appears at page App. 23.

The case arose from the filing of charges against petitioner and 17 others on February 4, 1980. On September 24, 1980, the Merit Board discharged petitioner and 5 others and retained the others in employment with various punishments. Suits were filed to review the Board's decisions and on July 12, 1982, the trial court reversed and remanded for proper findings. On December 13, 1982, the Merit Board made new findings which were substantially similar to their original ones and which inflicted the same punishments. On November 9, 1983, the trial court reversed all orders of suspension, demotion and discharge and ordered the plaintiffs reinstated. The appeal, above indicated, followed.

JURISDICTION

The order of the Appellate Court of Illinois, First District, was entered on

December 11, 1984. Petitioner submitted his Petition for Leave to Appeal timely and it was denied by the Supreme Court of Illinois on April 2, 1985, and this Petition for Writ of Certiorari is filed within 90 days of that date. This Court's Jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

STATUTORY PROVISION FOR JURISDICTION

62 Stat. 929 as amended 28 USC Sec. 1257(3):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question, or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948 c. 646, 62 Stat. 929."

STATUTES AND CONSTITUTION INVOLVED

Ill.Rev.Stat., Ch. 125, "Sheriffs".

> 62. Removal, demotion or suspension - procedure Sec. 12. Except as otherwise

provided in this Act, no deputy sheriff in the County Police Department and no employee in the County Department of Corrections shall be removed, demoted or suspended except for cause, upon written charges filed with the Board by the Sheriff and a hearing before the Board thereon upon not less than 10 days' notice at a place designated by the chairman thereof.* * *

USCA, Const. Amend. First:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

USCA, Const. Amend. Fourteen, Sec. 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF FACTS

On January 16, 1980, there was a meeting of the Board of Commissioners of Cook County

attended by from 150 to 300 Correctional Officers (COs) at which wage increases and other benefits for COs were discussed. Petitioner and many others were present. No agreement could be reached. On January 20, 1980, the COs began to call in sick on a large scale. On January 21, 1980, the COs formed picket lines to inform the public of the unfair salary and benefits suffered by the COs.

COs belonging to the Fraternal Order of Police (FOP), the Combined Counties Police Association (CCPA) and those belonging to no organization, all were involved in calling for higher salaries and better benefits because there was no official Union to represent the COs.

The COs called sick until January 30, 1980, at which time COs returned to work. During the period January 20 to January 30, 1980, COs not reporting to work was between 70% and 98% which was approximately 970 to

1100 of the near 1200 COs assigned to DOC. Meetings were held between County and DOC officials and COs to attempt to iron out differences. Reverend Jesse Jackson attempted to aid in resolving the differences, Rev. Jackson is president of Operation PUSH.

On January 27, 1980, Sheriff Elrod sent out mailgrams to COs which stated that if COs did not return to work by January 29, 1980, they would be dedeputized and suspended. On January 28, 1980, DOC Director Hardiman sent out letters of suspension to COs, named as 'creeps' on the 'hit list' gathered January 23, 1980, these suspension notices were received on or after January 31, 1980.

On January 30, 1980, approximately 400 of the COs who had been absent from duty reported for duty. Some of the COs had reported for duty as early as January 27, 1980; some of the COs were allowed to work; some of the COs who were working were sent

home under suspension; some of the COs were not allowed to work and suspended; some of the COs were not allowed to enter the DOC at all.

The regular attendance records were so poorly kept at the January 20 to January 30, 1980 period that there was much confusion as to who should be proceeded against in disciplinary proceedings at the Cook County Police and Corrections Merit Board, also there were so many COs absent that the names supplied by DOC officials in the January 23, 1980 meeting in Assistant Director Glotz' office did not match the 'creeps' with the persons who were to be disciplined before the Merit Board.

The Merit Board meted out arbitrary, harsh and unfair sentences to the 34 COs who were charged by the Sheriff before the Merit Board: (1) 2 were returned to work with all charges dropped and all back pay restored, (2) 14 were returned to work with time considered served in the amounts from 29 days to 90 days,

(3) 9 were returned to work with 180 days suspension, (4) 2 were demoted one rank, returned to work with 180 days suspension, (5) 1 was demoted two ranks, returned to work with 180 days suspension, and (6) 6 were fired outright. I was one of the 6 discharged. I was under doctors care with supporting medical statements which were not allowed in evidence and have been ignored for over 5 years.

In the Merit Board's original order of discharge, it found that the evidence indicated that Maggette "took more than a mere active participants role in the subject matter underlying these charges and assumed a leadership role therein" (A.R. 2516-18). This finding was challenged as completely unsupported by any competent evidence and was reversed by the trial court in its remand order. Significantly, no such finding was made by the Board in the new findings after remand (RC 511-514).

Sheriff Elrod's letter of January 23, 1980 stated he would not attempt to separate any participant in the "job action provided the action is settled within a reasonable length of time". (AR 1624) The Appellate Court refused to consider the amnesty issue because the plaintiffs did not return to work until January 30, 1980. It also ignores the testimony of Assistant Executive Director Glotz that some 350 officers reported back on January 30, 1980 (AR 1289) and were returned to work. Also not all those who failed to report on January 29, 1980 were suspended. (AR 1286)

The Appellate Court order fails to mention that at the agency hearing, an offer of proof was made along with actual testimony of Arthur L. Jones, Acting Captain and Chief of Security, that on January 23, 1980, at a meeting in Assistant Executive Director Glotz's office with Superintendents Patrick, Sullivan, Cornelius and Jones, it was stated

by Glotz that they were going to use the work stoppage to get certain correctional officers and he made a list of men the superintendents wanted to get rid of. (AR 1549) There were 4 lists made up and Jones named some of those thus selected and who selected them. (AR 1577, 1578, 1579) He was in the office when the lists were made up, and saw the people write the names. (AR 1580)

At no time did the Merit Board find that Maggette was engaged in an illegal work stoppage nor did it find that he was engaged in "incitement of...co-workers to such action" or "engaged in strike instigation" as alleged in the Appellate Court Opinion (pp. 67).

Judge J. Murray of the Circuit Court of Cook County remanded the Merit Board case back for new findings; there were no substantially new findings made and under the second Administrative Review, Judge Murray reversed the Merit Board in the area of the method of

selection in their selective prosecution and arbitrary penalties.

HOW FEDERAL CONSTITUTIONAL QUESTIONS WERE PRESENTED

Petitioner filed a timely Petition for Leave to Appeal with the Supreme Court of Illinois in which he contended, among other things:

1. That Maggette and other plaintiffs were selected for prosecution upon an arbitrary and inconsistent basis in violation of the Federal and State Equal Protection clauses.

2. The Merit Board was guilty of invidious selective punishment denying equal protection and due process.

3. The Merit Board violated due process in finding Maggette guilty of matters not in the charges and unsupported by evidence.

The Supreme Court denied the Petition for Leave to Appeal on April 2, 1985. Thus the Appellate Court of Illinois, First District,

is the highest court in the State in which decision could be had. 28 USC Sec. 1257(3)

ARGUMENT

1. THE RECORD CLEARLY SHOWS THAT THE PETITIONER, MAGGETTE, AND OTHER PLAINTIFFS, WERE SELECTED FOR PROSECUTION UPON AN ARBITRARY, UNJUSTIFIED, IRRATIONAL AND INCONSISTENT BASIS IN VIOLATION OF THE FEDERAL AND STATE EQUAL PROTECTION CLAUSES.

The Appellate Court opinion states that one claiming selective prosecution has the burden of showing (1) that others similarly situated had not been prosecuted for conduct similar to that for which he was prosecuted and (2) that his selection was based upon an impermissible ground such as race, religion or the exercise of his first amendment rights to free speech. Obviously, the grounds of race, religion and free speech are not the only impermissible grounds. They extend to any "other arbitrary classification". (People v. Lewis, 73 Ill. App. 3d 361, 365, 386 N.E. 2d 910, 914; and to bad faith (United States v.

Blitstein, 626 F.2d 774, 782). Moreover the element of intentional discrimination may appear on the face of the action taken with respect to a particular class or person (Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497; Ciechon v. City of Chicago, 686 F.2d 511, 522.)

It is admitted that on January 20, 1980 about 970 Correctional Officers called in sick and failed to report for work. Only 34 of the 970 officers who stayed off work from January 20 to 30, 1980 were selected for discipline. Fifteen of the 34 were returned to duty with time off their jobs considered a suspension. The record also shows that amnesty was given to those returning on January 29, 1980. It was denied to plaintiffs who returned to work on January 30, 1980 although hundreds of others who reported on the 30th were returned to work without discipline.

Furthermore, there is evidence and an offer of proof, as set forth in the statement

of facts, that the work stoppage was used to "get" certain correctional officers, apparently deemed personally objectionable to certain supervisors. This not only indicated a purposeful bad faith discriminatory action but it subverted the statutory provisions requiring proof of the reason for discharge. (Ill. Rev. Stat. Chap. 125, Sec. 62)

Prior to the taking of evidence before the Merit Board, counsel for plaintiff's argued the issue of "selective enforcement" (AR 190-192) but Board member Novelle said the Board did not have jurisdiction to hear that constitutional question (AR 190). Thus efforts to present evidence on the same were thwarted. Despite this, the facts above-mentioned clearly met any prima facie burden of showing purposeful discrimination.

The Appellate Court ignores the cases of Ciechon v. City of Chicago, 686 F.2d 511 and Olshock v. Village of Skokie, 541 Fed. 2d

1254. In Ciechon the court said (686 F.2d 522):

> The disciplinary proceedings against Ciechon also constituted a denial of equal protection of the law because they represented an arbitrary, irrational decision to discriminate among the two paramedics, Ciechon and Ritt, who were equally responsible for the welfare of the patient on all ambulance runs. Thus two persons similarly situated, in that they experienced the same set of circumstances and were equally responsible for patient assessment and treatment, were treated absolutely differently. Ciechon was charged with failure to perform her duties and discharged; Ritt was never charged or disciplined in any fashion. Since the discrimination was intentional, the equal protection clause was violated. United States v. Falk, 479 F.2d 616, 619 (7th Cir. 1973) (en banc)."

The court then concluded its equal protection ruling by saying (686 F.2d 524):

> The unequal treatment of Ciechon and Ritt was unreasonable and arbitrary and deprived Ciechon of equal protection of law. See Olshock v. Village of Skokie, 541 F.2d 1254, 1260 (7th Cir. 1976). Since the City had not even a rational basis for its disparate treatment of Ciechon and Ritt, no defense to the equal protection clause has been made out. Accordingly, we affirm the judgment of the district court on this additional ground.

The application of Ciechon to the case at bar is obvious and decisive. Maggette's participation in the work stoppage was no greater than the participation of over 900 officers who were not suspended, yet he was suspended and discharged. Since defendants in their Appellate Court brief said the record is silent as to the basis on which plaintiffs were selected for discipline (Def's brf. p. 55) they cannot claim and have not shown a rational basis or a compelling need for their patent discrimination.

2. THE MERIT BOARD WAS GUILTY OF INVIDIOUS SELECTIVE PUNISHMENT IN DISCHARGING PETITIONER FOR SUBSTANTIALLY THE SAME CONDUCT AND REASONS FOR WHICH OTHER EMPLOYEES WERE MERELY SUSPENDED.

The Appellate Court order disposes of the question of selective punishment by alleging that only those found to have engaged in strike instigation were disciplined in order to deter future strikes (page 7). Instigation is defined as the act by which one incites

another to do something, as to commit a crime or to commence a suit (Blacks Law Dictionary, 3rd Edition). Ballentine's Law Dictionary (3rd Edition) defines instigate "to stimulate or goad to action". There is no evidence in the record that Maggette engaged in strike instigation and the Merit Board did not find he did. The Appellate Court thus erroneously supplied findings not made by the Merit Board, and which were not supported by the evidence.

In this respect, the Appellate Court used the "sweeping broom" technique saying that "the different plaintiff's actions during the strike, as well as their differing ranks and responsibilities within the Department supports the imposition of different punishments" (page 7, 8). There was no evidence as to Maggette's responsibilities and he occupied the lowest rank of correctional officer. His status cannot be rationally distinguished from other correctional officers

who either were not disciplined at all or who were suspended and not discharged.

A short comparison of the Merit Board's findings as to Maggette with its findings as to those who were not discharged shows no viable, or substantial difference justifying the imposition of a discharge as to Maggette. For example:

1. The findings as to Maggette were identical with the findings as to plaintiffs Bailey and Bradley except the latter were not found guilty of failing to stay at home during a period of alleged illness. The Appellate Court concedes that this item of difference was not in the charges filed against Maggette, and even if it were, the finding would be void under Pienta v. Village of Schaumburg, 710 F.2d 1258, 1260.

2. The findings as to Maggette were the same as those made as to plaintiffs Burnett, Smith and Williams except the latter were not found guilty of acting in concert to jeopadize

the security of the Institution in violation of General Order No. 78-13 Section B(5) and (12). As shown hereinafter, there was no evidence to support this finding as to Maggette thus equating the findings of these 4 plaintiffs.

3. Maggette's findings were substantially the same as to those made against Muhammed, Leonard and Murphy except the latter were not found guilty of failing to return to work as ordered by the Circuit Court of Cook County. Considering the fact that hundreds of correctional officers were in court when Judge Wosik orally ordered them back to work and that Judge Wosik imposed no punishment on any officers, this item affords no rational basis for the difference in the findings or in the quantum of punishment.

It is abundantly clear that there was invidious discrimination not only between those punished and not punished but even among the 16 plaintiffs who were punished.

The Appellate Court relies on Strobek v. Ill. Civil Service Comm., 70 Ill. App. 3d 772 and Battle v. Ill. Civil Service Comm., 78 Ill. App. 3d 328. These cases dealt with a work stoppage by employees of the Department of Labor. From Battle it appears that over 280 employees were discharged initially but most of the striking employees had their discharges converted to suspensions because of a settlement between the union (AFSCME) and the Department. Thirty three employees remained discharged because they either instigated the strike or engaged in picket line misconduct. There was thus a substantial difference between those suspended and those discharged. No such substantial difference exists between Maggette and those either not disciplined or just suspended.

In Olshock v. Village of Skokie, 541 Fed. 2d 1254, certain striking employees were suspended and others were discharged. The

court could find no basis for this discrimination except the fact that those discharged hired attorneys and those suspended did not. It stated this created a suspect classification for which the defendants failed to show a compelling need. In the case at bar, no sensible, reasonable or evidentiary basis existed for the imposition of a discharge on Maggette while others identically situated kept their jobs.

3. THE MERIT BOARD VIOLATED PETITIONER'S DUE PROCESS RIGHTS IN BASING ITS DECISION ON MATTERS NOT CONTAINED IN THE CHARGES AND UPON INSUFFICIENT EVIDENCE.

The Appellate Court concedes that the Merit Board erred in finding Maggette guilty of failing to stay at home while absent from work, but says the remaining findings were sufficient to support his discharge. However, item 6 of the findings alleged Maggette failed to report for duty on January 29, 1980 as ordered by mailgram. No such charge was filed against him.

Item 4 of the findings alleges Maggette failed to furnish a doctor's verification of alleged illness in violation of G.O. 78-11 Sec. 21(E)(4). The basic charge in Count II was that Maggette was absent from duty without leave or permission not that he failed to furnish a doctor's slip upon return to duty. Maggette reported for duty on January 30, 1980 but was refused restoration and was forthwith suspended. There was no evidence he was asked for a medical slip or that this played any part in the department's refusal to return him to work. Moreover neither General Order No. 78-11 Sec. VI (E)(4) or the Emergency Procedures Memorandum of January 18, 1980 prescribe punishment for failure to produce a doctor's slip but simply prescribe what documentation is needed in order to pay an employee for his sick time.

Finding 2 alleges that Maggette acted in concert with others to jeopardize the security

of the institution in violation of Art. VIII, Sec. B(4) (violation of any G.O.) and (10) (neglect to perform duties) of R & R and G.O. 78-13 Sec. B(5) and (12). G.O. 78-13 Sec. B(5) was never mentioned in the charges and in any event deals with action or inaction by one on duty allowing contraband, weapons and the like to come into the institution. Sec. B(12) refers to "creating, contributing to or concealing a disorder in the institution by act or omission". There is simply no evidence that Maggette, or other plaintiffs, created, contributed or concealed a disorder or that any disorder did occur. There was testimony that some officers worked extra shifts and additional help was secured but not that any disorder occurred. The absence of 970 officers created inconveniences but not disorder or riots. Moreover, if this did not require any discipline as to over 930 absent officers, the defendants have shown by their actions that this finding constitutes no cause

for removal.

Finding 5 alleges failure to return to work as ordered by the Circuit Court in violation of Art. VIII, Sec. B(7) (fail to obey a lawful order) and G.O. 78-13, Sec. B(11) (acts of disobedience or disrespect to a superior officer, etc.). It is submitted that the sections allegedly violated refer to orders of a superior officer and disrespect to a superior officer and not to court orders which are properly enforced by the court. Maggette did in fact return to work within a reasonable time from the Court Order but was locked out.

Maggette concedes that an agency's findings and conclusions on questions of fact are to be held as prima facie true and correct, but this presumption does not apply to questions of law or legal interpretations of rules. (Leslie Car Wash v. Ill. Dept. of Revenue, 39 Ill. App. 3d 931, 351 N.E. 2d 296,

299). The board's interpretation of the applicability of some of its rules is erroneous and constitutes an attempt to "puff up" its findings.

4. THE DISCHARGE OF MAGGETTE WAS EXCESSIVE AND A GROSS ABUSE OF DISCRETION AND VIOLATED DUE PROCESS AND THE PUBLIC POLICY OF MAINTAINING CONSISTENT AND EVEN HANDED JUSTICE.

Throughout this proceeding, Maggette has maintained that the imposition of the ultimate and drastic penalty of discharge was, under the facts of this case, unreasonable, unnecessary and a manifest abuse of discretion. This contention was independent of the issues of selective prosecution and selective punishment.

Courts have the right and duty to determine whether, under all the facts and circumstances, cause for removal exists. (Caliendo v. Goodrich, 34 Ill. App. 3d 1072, 1075-76, Kreiser v. Police Board of Chicago, 69 Ill. 2d 27; and to remand for imposition of

a lesser measure of discipline. Res v. Civil Service Comm., 49 Ill. App. 3d 852, Thomas v. Police Board, 90 Ill. App. 3d 1101, Kreiser v. Police Board, 69 Ill. 2d 27, 370 N.E. 2d 511, 513). Maggette was employed over 14 years with a clear record. Like the others he participated in the job action stoppage over wages and benefits. Both Sheriff Elrod and Director Hardiman said the employees were entitled to a raise (AR 368). Judge Wosik endeavored to get the employees an 8% raise (AR 605-607). The imposition of economic and professional death upon Maggette was, it is submitted, a gross abuse of discretion and unjust.

The Appellate Court, in passing on the constitutional issues of selectivity, justified the discharge "in order to deter future strikes" (page 7). However, it did not discuss the issues of gross abuse of discretion in quantum of punishment. In any context, it would seem the penalty of 6 months

suspension without pay constitutes a strong and sufficient deterrent to future strikes.

Further, the discriminatory punishment imposed on Maggette violated the policy of consistency and even handed justice in disciplinary matters (People v. Godinez, 92 Ill. App. 3d 523, 415 N.E. 2d 36, 38, 47 Ill. Dec. 311, 313, Basketfield v. Daniel, 71 Ill. App. 3d 877, 390 N.E. 2d 492, 495, 28 Ill. Dec. 325, 328).

Because of the Appellate Court's failure to consider the issues discussed in this point, this court should grant certiorari.

5. THE APPELLATE COURT ERRED IN FAILING TO HOLD THAT PLAINTIFFS WERE NOT ENTITLED TO THE AMNESTY GRANTED TO OTHERS WHO ALSO RETURNED TO WORK ON JANUARY 30, 1980.

The Appellate Court did not consider the amnesty issue raised by Maggette and other plaintiffs because they did not return to work until January 30. The court stated that a memo by Director Hardiman and a letter of

Sheriff Elrod restricted the amnesty to those returning to work by January 29, 1980 (page 10).

The record shows that the letter from Sheriff Elrod to Reverend Jackson was dated January 23, 1980 and stated in relevant part: (AR 1624 Jones Exhibit 1-4 pages)

Dear Reverend Jackson:

Pursuant to our meeting this morning, January 23, 1980, I agree that:

* * *

2. That I will not attempt to separate from the Department of Corrections any person that participated in the "job action" provided that the action is settled within a reasonable length of time;

* * *

Subsequently, on February 4, 1980, 5 days after everyone had reported for work, Director Hardiman issued a memorandum in part as follows:

> There has been much discussion about what agreement was reached regarding fringe benefits, and some confusion as to what was granted.

> Attached are letters from President George Dunne and Sheriff Richard Elrod regarding those benefits.
>
> In Sheriff Elrod's letter, the reasonable length of time mentioned in points 2 and 3 was up to, and including 29 January 1980; all Officers who did not return by this deadline will be charged before the Cook County Police and Corrections Merit Board.

It is apparent that a settlement was reached on January 29, 1980 and that all of the time between January 23, and January 29 should be counted as excused absence. Thus a return on January 30, 1980 would be within the terms of the agreement between the Sheriff and Reverend Jackson. It is noted that no notice of a mutual change in this agreement was issued on or before January 30. Hardiman's unilateral memo of February 4, 1980 was after the fact and after Maggette was suspended from work. Additionally, as hereinbefore shown, about 350 officers reported for duty on January 30 of which 316 were returned to duty without any discipline. This situation is similar to that in Olshock v. Village of

Skokie, 541 F.2d 1254, 1259 where those returning on July 13, 1975 were only suspended and those returning on July 14, 1975 were discharged. The court there stated:

> "Nowhere does the record or the findings indicate that the discharged men were advised by anyone that July 13, was a crucial deadline between future professional life and death. And, in fact the "deadline" was not actually adhered to..."

Although estoppel is not a favored remedy when asserted against a public body, in this instance it is only fair to hold the Sheriff and Executive Director to their promise. Courts, in determining whether to apply estoppel to public bodies, have looked to see whether the officer or agent had authority to bind the public body. Anderson v. Board of Trustees of Community College, 56 Ill. App. 3rd 937, 14 Ill. Dec. 522 (4th Dist., 1978). The facts before the trial court merited a determination that Sheriff Elrod not only had the authority to excuse absenses, but that he and Executive Director Hardiman are the

highest authorities who could have authorized the "grace period". Ill. Rev. Stat. Ch. 125 Sec. 203 authorities the Sheriff in counties with populations over 1,000,000 to operate and have jurisdiction over the county jail. Section 204 specifies that the Sheriff shall appoint a five-member board to establish rules and regulations to implement the Department of Corrections but, "The Board shall not have administrative or executive duties and shall not deal with specific procedural matters". Further, Section 212 states that the Sheriff shall appoint an Executive Director who shall act as the chief executor and administrative officer of the Department of Corrections. By statute, Sheriff Elrod and Executive Director Hardiman are the two highest officers of the Department.

By virtue of Sheriff Elrod's and Executive Director Hardiman's positions, the Merit Board is estopped from denying their

authority to excuse absences from duty. Anderson v. Board of Trustees, supra. There is a parallel between the facts of this case and Stahelin v. Board of Education, 87 Ill. App. 2d 28, 230 N.E. 2d 465 (2nd Dist., 1967), wherein the court affirmed that estoppel may operate against the State when acting in its governmental capacity, and that if, under the circumstances, affirmative acts of the public body have created a situation which it would be unjust to permit it to deny, estoppel may be applied.

CONCLUSION

Based on the foregoing, petitioner Maggette submits that this court should grant leave to appeal for the following reasons:

1. The absence of a relevant opinion by this court on the constitutional issues and selective prosecution and punishment in the important field of work stoppages.

2. The conflict between the majority and dissenting opinion in Strobeck v. Illinois

Civil Service Comm., 70 Ill. App. 3d 772.

3. The apparent conflict between Strobeck and Battle v. Illinois Civil Service Comm. with reference to Ciechon v. City of Chicago, 686 F.2d 511 and Olshock v. Village of Skokie, 541 Fed. 2d 1254 (both Illinois related).

4. The undisposed of issues involving Amnesty, Excessive Punishment and Consistent and Even Handed Justice.

Respectfully submitted,

Elijah Maggette
7522 So. Langley Ave.
Chicago, IL 60619
312-723-5250

APPENDIX

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

83-2979
83-2980
83-2981
83-3020
Consolidated

Second Division
December 11, 1984

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELIZABETH O'CARROLL, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
FRANKLIN LEONARD and ALICIA SPEARS, Plaintiffs-Appellees,	)	
ELIJAH MAGGETTE, Plaintiff-Appellee,	)	
HARDY BURNETT, HUBERT SMITH, QAADIR A. MUHAMMED, ARTHUR L. JONES, PERCY WILLIAMS, BERNARD MURPHY, TOMMYE BROWN, CLYDE C. BRADLEY, PHILLIP MORRIS, WINFIELD GARNETT, THOMAS WHITE, and ADOLPHUS BAILEY, Plaintiffs-Appellees,	)	
vs.	)	
COOK COUNTY POLICE and CORRECTIONS MERIT BOARD, ROBERT A. NOVELLE, SAMUEL W. NOLAN, E. JAMES GARBUT, RICHARD J. ELROD) Sheriff of Cook County, and PHILLIP T. HARDIMAN, Executive Director, Cook County Department of Corrections, Defendants-Appellants.	)	Honorable James C. Murray, Judge Presiding.

83-2980
83-2981
83-3020 Consolidated

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

The causes were brought before the Cook County Police and Corrections Merit Board (Merit Board) by the Sheriff of Cook County, seeking disciplinary action against the plaintiffs for their participation in a work stoppage at the Cook County Department of Corrections (Department) in January 1980. The work stoppage involved approximately 970 correctional officers, of whom 34 were suspended by the Department. Fifteen of those suspended were returned to duty with time off their jobs considered served. Charges were filed by the Sheriff with the Merit Board against 18 of the officers. The Merit Board discharged six of the 18, demoted and suspended three and suspended nine. Sixteen of the disciplined officers filed complaints for administrative review. Upon administrative

review, the circuit court of Cook County remanded the causes to the Merit Board for findings of fact. Upon further review, the circuit court reversed the orders of the Merit Board and defendants now appeal.

On January 20, 1980, employees of the Department of Corrections began a work stoppage at the Cook County Jail complex. This work stoppage continued until January 30, 1980, and was characterized by substantial numbers of officers failing to report for work and calling in sick; the number of officers involved varying from 70 to 90 percent of the Department's total work force.

Prior to the commencement of the work stoppage, Department employees held union meetings during which they voiced demands for salary increases and other benefits and threatened to strike if these demands were not

met. Circulars outlining plans for the January 20 strike were distributed to employees present at the meetings. During the strike, the striking officers picketed the corrections complex and attended meetings at Operation P.U.S.H. headquarters. On January 26, the Department obtained an order from the circuit court ordering the striking officers to return to work within 24 hours. On January 27, mailgrams were sent to all absent officers ordering them to return to work by January 29. The officers began returning to work on January 30.

Complaints against 18 of the striking officers were filed with the Police and Corrections Merit Board on February 14, 1980. Evidentiary hearings began on February 27, and continued until August 11, 1980.

At the conclusion of the hearings, the Merit Board discharged plaintiffs Jones,

Brown, Morris, Garnett, White and Maggette, suspended and demoted plaintiffs Smith, Murphy and Bailey, and suspended plaintiffs Burnett, Muhammed, Williams, Bradley, O'Carroll, Spears and Leonard. These 16 plaintiffs filed complaints for administrative review. On July 12, 1982, the circuit court reversed and remanded these cases to the Merit Board for more detailed findings of fact. Upon remand, the Board entered additional findings of fact and orders as to each of the plaintiffs. Plaintiffs again filed complaints for administrative review, and the circuit court reversed the Merit Board's findings and orders in all the cases. Defendants appeal.

Defendants first contend that the circuit court improperly considered evidence outside the record in reaching its decision to reverse the findings of the Merit Board. (See Ill.

Rev. Stat. 1981, ch. 110, par. 3-110.) Although it is unclear from defendants' argument exactly what evidence defendants complain of, it appears that they object to the court's consideration of the fact that 15 of the 34 officers suspended by the Department "were returned to duty with time off their jobs considered served."

Although plaintiffs have provided no citation to the administrative record showing that this evidence was in fact adduced during the administrative hearings, an examination of the testimony in the circuit court reveals that the fact that 15 of the suspended officers were returned to duty was noted by an assistant State's Attorney during his arguments. Defendants therefore will not now be heard to complain that the circuit court erroneously considered this fact in reaching its decision.

Defendants next contend that the circuit court improperly reversed the Merit Board's findings and orders on the basis of "selective prosecution in violation of the equal protection clause". It is well established that the conscious exercise of prosecutorial selectivity is not in itself a Federal constitutional violation. (People v. Lewis (1979), 73 Ill. App. 3d 361, 364, 386 N.E.2d 910.) The decision whether or not to prosecute may not, however, be based upon the constitutionally protected grounds of race, religion or the exercise of first amendment rights. (United States v. Falk (7th Cir. 1973), 479 F.2d 616.) It has been held, with regard to prosecutions for violations of the criminal law, that such prosecutions are presumed to have been undertaken in good faith. (479 F.2d 616, 620.) To overcome this

presumption, the burden is on the defendant to present sufficient facts to make out at least a prima facie case of improper discrimination. This requires that the defendant demonstrate first, that others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted, and secondly, that his selection was based upon an impermissible ground such as race, religion or the exercise of his first amendment rights to free speech. (United States v. Scott (9th Cir. 1975), 521 F.2d 1188, 1195.) These standards also apply to allegations that disciplinary action has been taken against a police officer as a result of selective discriminatory prosecution. McLean v. Rochford (N.D.Ill. 1975), 404 F.Supp. 191, 199.

In the instant case, plaintiffs are unable to make out a prima facie case of

improper discrimination. Although the record shows that only 34 of the approximately 970 striking officers were charged, we must presume that the suspension or discharge of all 970 officers, comprising some 70 percent of the Department's work force, would have debilitated the Department. Consequently, the Department could, in its discretion, choose not to attempt to discharge all of the participants in the strike. See Strobeck v. Illinois Civil Service Commission (1979), 70 Ill. App. 3d 772, 777-78, 388 N.E.2d 912.

Furthermore, there has been no proof that the selection of the 34 officers for disciplinary action was based on an impermissible ground. Plaintiffs contend that they were disciplined because they exercised their right to freedom of speech in the form of a strike and picket line. However, the

record does not support this contention. The record shows that plaintiffs were disciplined either for engaging in an illegal work stoppage, a legitimate ground for discipline, (Battle v. Illinois Civil Service Commission (1979), 78 Ill. App. 3d 828, 836, 396 N.E.2d 1321) or for being absent from work without proper medical justification. Because participation in an illegal work stoppage is not protected conduct under the first amendment, (Strobeck v. Illinois Civil Service Commission, (1979), 70 Ill. App. 3d 772, 778, 388 N.E. 2d 912) plaintiffs cannot be heard to object on first amendment grounds to disciplinary action taken against them as the result of their incitement of their co-workers to such action. In addition, plaintiffs' presence at labor meetings and on picket lines at times during which they had claimed medical

excuses for not reporting for work was properly considered as a basis for charging plaintiffs with being absent without proper medical justification. We therefore find that there was no basis for the circuit court's finding that defendants subjected plaintiffs to selective prosecution in violation of their constitutional rights. Cf. Meltzer and Sunstein, Public Employee Strikes, Executive Discretion, and The Air Traffic Controllers, 50 Chi.L.Rev. 731 (1983).

Defendants next contend that the circuit court erred in finding that plaintiffs were selectively punished in violation of the equal protection clause. Plaintiffs contend that the differing punishments imposed upon them denied them equal protection of the law. This contention is based upon the fact that, of the 16 plaintiffs, six were discharged, three were

demoted and suspended and seven were suspended. The question presented to this court is whether such differing treatment of officers who participate in a work stoppage can pass constitutional muster. This question was considered and answered in the affirmative in Strobeck v. Illinois Civil Service Commission (1979), 70 Ill. App. 3d 772, 388 N.E.2d 912, in which we noted that the right to public employment is not fundamental in an equal protection context. (70 Ill. App. 3d 772, 777-78.) It should also be noted that in the instant case the Department had just cause to discharge all 970 officers who engaged in the strike; however, only those found to have engaged in strike instigation were disciplined in order to deter future strikes. Such a classification of strikers has been upheld as rationally related to the fulfillment of

legitimate State purposes where, as in the instant case, plaintiffs' claim does not involve the consideration of any suspect classifications. (See Battle v. Illinois Civil Service Commission (1979), 78 Ill. App. 3d 828, 832-33, 396 N.E.2d 1321.) The evidence presented before the Merit Board regarding the different plaintiffs' actions during the strike, as well as their differing ranks and responsibilities within the Department, supports the imposition of different punishments upon them by the board. We therefore find that the circuit court erred in holding that the Merit Board's punishment of plaintiffs was unconstitutionally selective.

Defendants next contend that the circuit court was without jurisdiction to enter its second order reversing the Merit Board's findings because the court's first order

remanding the cause to the Merit Board was final. This contention is without merit.

It is well established that an order of the circuit court remanding a case to the Merit Board is interlocutory in nature and is not final. Rather, the board must act on the circuit court's order, and the circuit court must confirm such action. (Robinson v. Cook County Police and Corrections Merit Board (1981), 93 Ill. App. 3d 1051, 1052, 418 N.E.2d 170.) This is precisely what occurred in the instant case. The language of the circuit court's remand order purporting to make the order final is superfluous and does not alter the order's interlocutory status. 93 Ill. App. 3d 1051, 1052.

Plaintiffs raise several arguments in their briefs. Our analysis of these arguments is premised on the settled principle that, under the Administrative Review Act, the

findings and conclusions of the board on questions of fact are prima facie true and correct, (Ill. Rev. Stat. 1981, ch. 110, par. 3-110) and must be affirmed unless against the manifest weight of the evidence, Cybularz v. Quern (1981), 96 Ill. App. 3d 845, 849, 422 N.E.2d 123.

Plaintiff Maggette argues that he was improperly disciplined for matters which were not set forth in the charges filed against him. It is fundamental that an employee cannot be discharged for a violation with which he was not charged. (Batley v. Kendall County Sheriff's Dept. Merit Commission (1981), 99 Ill. App. 3d 622, 626, 425 N.E.2d 1201; Cartwright v. Illinois Civil Service Commission (1980), 80 Ill. App. 3d 787, 793, 356 N.E.2d 1079.) However, the only matter included in the Merit Board's findings against

plaintiff Maggette which was not included in the charges filed against him was his failure to stay at home while absent from work for medical reasons. An examination of the record shows that the remaining findings against Maggette were sufficient to support his discharge.

Plaintiff Maggette, along with plaintiffs Leonard and Spears, also contends that the Merit Board lost jurisdiction to order his suspension due to the failure of defendants to refile charges or to request a hearing on the previously filed charges within 30 days of plaintiff's initial suspension by the Department. (See Zurek v. Cook County Police and Corrections Merit Board (1976), 42 Ill. App. 3d 1044, 356 N.E.2d 1079.) However, the record shows that the charges were filed and hearings commenced within 30 days of January

29, 1980, the date plaintiffs were suspended by the Department pending proceedings before the Merit Board.

Plaintiffs Leonard and Spears also contend that the evidence against them was insufficient to support their suspensions. Our examination of the record, however, reveals that the board's findings were not contrary to the manifest weight of the evidence. See Strobeck v. Illinois Civil Service Commission (1979), 70 Ill. App. 3d 772, 777-78, 388 N.E.2d 912.

Plaintiff O'Carroll, along with plaintiffs Maggette, Leonard and Spears, contends that she was granted "amnesty" by virtue of a memorandum issued by Executive Director Hardiman and a letter issued by Sheriff Elrod to the effect that officers who returned to work by January 28, 1980, would

not be discharged. However, because plaintiffs did not in fact return to work until January 30, we will not consider this contention.

Plaintiff O'Carroll also argues that the Department's "stay at home" rule is unconstitutional. Her position is supported by Pienta v. Village of Schaumburg (7th Cir. 1983), 710 F.2d 1258. However, we find that the findings against O'Carroll are sufficient to support her suspension absent a finding that she violated the stay at home rule.

The remaining plaintiffs present three contentions of error on the part of the Merit Board. The first, entitled "Demotion nor Suspension Can Be Sustained in Decisions Based Upon Complaints and Proofs Wherein Constitutional Rights are Violated" [sic], is somewhat poorly worded, but appears to argue

that the work stoppage was not illegal and that there was no work stoppage. Plaintiffs also argue the rights of police officers to freedom of speech.

As we have stated above, it is apparent from the record that a work stoppage did in fact occur, and the law in Illinois is clear in stating that work stoppages by public employees are illegal and that participation in an illegal work stoppage is not protected conduct under the first amendment. (Strobeck v. Illinois Civil Service Commission (1979), 70 Ill. App. 3d 772, 778, 388 N.E.2d 912.) We therefore find plaintiffs' first contention to be without merit.

Plaintiffs next argue that the failure of the Merit Board to prohibit the admission into evidence of plaintiffs' time cards and the testimony of the Department's timekeeper was

reversible error. However, it is clear that the board's decision as to these plaintiffs would have been the same had this evidence been excluded. The only purpose of the evidence complained of was to prove that plaintiffs were absent from work during the strike. Because this fact is not contested, the admission of the timekeeper's records and testimony, even if error, was harmless.

Plaintiffs finally contend that the consolidation of their causes by the Merit Board was unlawful. Consolidation is favored by the courts of Illinois and is proper where, as here, the several cases involve an inquiry into the same event. (Lake County Forest Preserve Dist. v. Keefe (1977), 53 Ill. App. 3d 736, 739-40, 368 N.E.2d 1096.) "Consolidation of separate causes for trial is discretionary with the trial court and where

separate causes are of the same nature, arise from the same act or event, involve the same or like issues and depend largely upon the same evidence, consolidation is not an abuse of discretion." (Stone v. City of Belvidere (1976) 39 Ill. App. 3d 829, 833, 350 N.E.2d 526). We find that the consolidation of the plaintiffs' causes was not improper.

The record in the instant case contains no evidence that plaintiff Karl Davis filed a complaint for administrative review. Therefore, the circuit court should not have included him in its order reinstating plaintiffs with back pay.

The decision of the circuit court reversing the findings and orders of the Merit Board is reversed and the findings and orders of the Merit Board are reinstated.

Reversed.

83-2980
83-2981
83-3020 Consolidated

Dated at Chicago, Illinois, this 11th day of December, 1984.

Hartman, PJ., Stamos and Downing*, JJ.

*Justice Downing participated in the above-captioned case before the expiration of his term in office.

61451

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

April 2, 1985

Mr. Richard F. McPartlin
Attorney at Law
333 W. Wacker Dr., S#810
Chicago, IL 60606

No. 61451 - Elizabeth O'Carroll, et. al. (Elijah Maggette, petitioner, v. Cook County Police and Corrections Merit Board, et. al., etc., respondents). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for Leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 23, 1985.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

Elijah Maggette et. al.,	)	Consolidated
	)	83 L 50166
Plaintiffs,	)	80 L 23710
	)	83 L 50161
-vs-	)	80 L 25262
	)	83 L 50127
Cook County Police and	)	80 L 25428
Correction Merit Board, and	)	80 L 25460
Richard J. Elrod, Sheriff of	)	83 L 50121
Cook County, Illinois,	)	80 L 25500
	)	
Defendants.	)	

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable JAMES C. MURRAY, Judge of said Court, on the 9th day of November, 1983, at the hour of 11:00 o'clock A.M.

PRESENT:

MR. RICHARD MCPARTLIN,
appeared for Elijah Maggette;

MR. RONALD SAMUELS,
appeared for Hardy Burnett, et. al.;

HON. RICHARD M. DALEY,
State's Attorney of Cook County, by
Mr. Leonard Foster,
Assistant State's Attorney,
appeared for the defendants.

Gregory L. Armstrong
Official Court Reporter
Law Division
Circuit Court of Cook County

THE COURT: We will call the case of Elijah Magette; Hardy Burnett, et. al.

These cases, numbers 80 L 23710; 80 L 25262; 80 L 25428; 80 L 25460, and 80 L 25500 are all cases involving common issues of law and fact. They have been consolidated in this Court solely for the purposes of judicial economy. For that purpose the Court is treating all individual cases in this one opinion.

All cases involve an administrative review of decisions of the Cook County Police and Merit Board imposing discipinary action on all the respective plaintiffs from suspensions to outright discharges as a result of activities they allegedly engaged in during a 1980 work stoppage or strike by Cook County correctional employees.

The respective plaintiffs of the punishment imposed are Elijah Maggette, discharged; Hardy Burnett, suspended one hundred and

eighty days; Hubert Smith, suspended one hundred and eighty days; Carl Davis, suspended one hundred and eighty days. Quadra, that's -- Quadra Mohammed, one hundred eighty days; Arthur Jones, discharged; Percy Williams, suspended one hundred and eighty days; Bernard Murphy, reduced in rank and suspended one hundred and eighty days; Tommye, T-o-m-m-y-e, Brown, discharged; Clyde Bradley, suspended one hundred and eighty days; Philip Morris, discharged; Winfield Garnett, discharged; Thomas White, discharged; Adolphus Bailey, reduced in rank and suspended one hundred and eighty days; Franklin Leonard, suspended one hundred and eighty days; Alicia Spears, suspended one hundred and eighty days, and Elizabeth O'Carroll, suspended one hundred and eighty days.

The fact is the findings relating to these seventeen plaintiffs are almost all identical; to wit, that they remained ill at

home despite the fact that they were seen at various locations. The plaintiffs employment with the Department of Corrections of Cook County ranges from twenty-two years downward.

The facts giving rise to this case are as follows: In the course of the winter of 1979 and 1980 the question arose before the County Board as to whether pay raises could be given security personnel at the Cook county jail. Although there was no collective bargaining agreement between the Cook County security personnel and the County in effect at the time, a number of organizations, including the Fraternal Order of Police and Operation Push acted on the employees behalf.

On January 16th, 1980 a hearing was attended by a large number of jail guards. On January 18th, 1980 Philip Hardiman, the Executive Director of the Cook County Department of Corrections issued a special order relating to a possible work stoppage.

The order was placed on the bulletin board and placed on counters where paychecks were distributed.

On January 20th, 1980 beginning with the 8:00 to 4:00 p.m. shift some eighty to ninety percent of the County's jail work force was absent. Many of the missing employees called in to request sick leave.

On January 22nd, 1980 the President of the County Board, the Sheriff and Executive Director met with persons purporting to represent the non-working employees. As a result of this meeting a letter was sent to Jessie Jackson, Director of Operation Push advising him that no disciplinary action would be taken against those employees who returned to work in a reasonable time.

On January 23rd, 1980 the Chancery Division of this Court through Judge Wosik issued an order that the non-working employees return to work. On January 26th, 1980 Sheriff

Elrod and Hardiman met with representatives of the non-working employees at the Operation Push headquarters that afternoon. Judge Wosik again ordered the employees back to work.

On January 26th after the second return to work order, the Sheriff sent mailgrams to all non-working employees stating that those not returning by January 29th, 1980 would face disciplinary action. Almost all the employees returned to work beginning with 4:00 p.m. to mid, to the midnight shift on January 30th, 1980.

Some of those reporting for work were advised that they had been suspended pending action by the Cook County Board Police and, -- Correction; Merit Board. Through out the period of the work stoppage employees who claimed to be sick and entitled to leave were seen attending meetings and picketing at various locations.

In any event, thirty-three employees of

the, plus nine hundred jail guards who participated in the work stoppage, thirty-three were suspended, fifteen of those thirty-three suspended were returned to duty with time off their jobs, their job considered served. Charges were filed against the remaining eighteen. Administrative hearings were held as to the eighteen. After the hearing six of the eighteen were ordered discharged by the defendant Board. Three were ordered demoted and suspended for a hundred and eighty days, and nine were suspended for a hundred and eighty days.

As noted by the caption of this case, seventeen of the eighteen employees against whom sanctions were imposed sought administrative review, and in these cases they all seek a reversal of the administrative decision either with an order of reinstatement or back pay. After previous hearings on the matter, -- on July 12th, 1982 this Court reversed the cause to the defendant Merit

Board and remanded for further proceedings in accordance with an opinion it rendered. In its then opinion this Court noted the limited roll of the judiciary in view of an administrative agency's orders suspending or discharging a public employee.

In its then opinion this Court also pointed out the defects that it considered in the original proceedings that made it difficult if not impossible to judicially review the underlying decisions of suspension and discharge. They were, number one, the treatment of the plaintiffs as a group rather than individually to have any sufficiency in any of the underlying complaints to support a general finding of guilt, and finally, the failure of any of the underlying orders to contain adequate findings of fact to support the ultimate orders of discharge or suspension.

After the Court's July 12th, 1982

reversal and remandment, the defendant Merit Board took the matter up again. However, they did not take the matter up until September 13th, 1982, some sixty-three days subsequent to this Court's July 12th, 1982 order of reversal and remandment. By this Court's July 12th, 1982 order of reversal and remandment, the defendants should have either appealed this Court's ruling within thirty days as was their right. And under that order, or obtain a stay order or reinstate, reinstate the plaintiffs pending further hearings.

The defendant did not take any of these procedural requirements. But the Board, the defendant Board did on September 13th, 1982 hold a hearing over the objection of at least one of the plaintiffs. The defendant Board treated the remanded matter as a consolidated case and suggested that all this Court did by its July 12th, 1982 reversal and remandment was to remand the matter back for the purpose of making findings of fact.

The Board at its September 13th, 1982 hearing suggested that counsel for the parties submit proposed findings. All of the plaintiffs declined to submit proposed findings at the September 13th, 1982 hearing. The State's attorney did submit findings of fact which the Board, which were adopted by the defendant Board.

The defendant Board entered its own order adopting the findings of fact of the State's attorney on December 13th, 1982. All of the plaintiffs returned to this Court rebriefing and rearguing their cases through their excellent counsel, including the Board's through the State's attorney.

This Court based on the following case law must again reverse the decision of the Cook County Police Board and Correction, -- correction; The Police and Correction Merit Board imposing sanctions ranging from discharge, reduction in rank and suspension

for a hundred and eighty days. It must do so for a variety of reasons.

First: This Court is well aware of its limitations in the review of the decision of administrative agency, particularly in the area of imposing the sanctions of the motion; discharge or suspension of public employees for misconduct in their public employment.

The Court's jurisdiction in such cases is limited to a determination of whether the administrative decision is supported by adequate findings of fact, and if so whether the findings are supported by the manifest weight of the evidence. In other words, the Court must determine whether the agency proceeded in its discharge proceedings in accordance with law, respecting the statutory and constitutional rights of the employees.

If the Court finds that the agency has complied with these substantive and procedural requirements and that some discipline was

warranted, the Court must then determine whether the extreme sanction of discharge is proper under the circumstances of the case. Department of Mental Disability vs. Civil Service, 1981 case; 85 Illinois 2nd 547. In this case, involving seventeen County Correctional employees who reported sick or otherwise failed to return to work during a work stoppage involving working conditions and offer of amnesty if the employees returned to work in a reasonable time, the Court must conclude that the defendant agency failed to proceed according to law.

Nothing in the record originally and on the second review indicates a rational basis or finding why the seventeen employee plaintiffs should be selected for discipline from among the nine hundred County jail work force that engaged in the job action. Nothing in the record discloses why the seventeen plaintiffs were picked for discipline from the thirty-three originally selected.

Further, when this Court reversed and remanded the cause to the agency, the defendant agency instead of obtaining a stay of this Court's order pending its review of this Court's opinion and order of remandment, and -- reexamining the complaint and the findings, the Board merely adopted findings submitted by the State's attorney. The defendant board did not even address itself to the question of selective prosecution. Apparent in the record, or in light of the recent Supreme Court's decision relating to cause, whether the alleged wrongful acts of principally feigning sickness warranted the extreme penalty of discharge, reduction in rank and suspension for a hundred and eighty days this Court must reiterate its statement originally made in its first opinion, that the engagement by the plaintiffs in an unlawful work stoppage or strike would be cause for this discharge or suspension. However, once

having decided not to discharge all nine hundred of the employees and offer, -- in offering and giving some amnesty the defendant, whereby Federal constitutional requirements, to use a rational basis for the imposition of this discipline; that must in this Court's judgment appear in the record, in the findings or the record.

A case specifically on point is Olshack, O-l-s-h-a-c-k, -vs- Skokie, 541 Fed. 2nd, 1254. In that case, which was a case of a work stoppage of Skokie police officers of fifty-four of the officers who were disciplined, thirty-four were discharged and twenty suspended. The only discernable pattern of treatment was that thirty-four who were discharged appeared with an attorney and the twenty suspended appeared without an attorney. The Circuit Court of Appeals held that the defendant Board in that case violated both Illinois law and the Equal Protection Clause

of the Fourteenth Amendment in a wholly arbitrary manner in purporting to distinguish between suspension and discharge. Actually, the Court said they were distinguishing between the employing or not employing of counsel.

The instant case in this Court's mind there is even a more serious case of arbitrary action that would, than is present in the Olshack. Here there is not only no basis in the record to indicate why these seventeen plaintiffs were selected for disciplinary action from the, some nine hundred participants in the strike or work stoppage, nor why the seventeen plaintiffs were selected for discharge, demotion and or suspension from the thirty-three originally targeted for discharge action.

Finally, even among the seventeen plaintiffs there appears no basis in the record as to why plaintiffs, -- for example,

plaintiffs Maggette, Jones, Brown and Morris, Garnett and White were given the extreme penalty of discharge and others suspended for, apparently, the same conduct, i.e., failing to remain at home during a period they claim to have been ill; nor is there any basis in the record as to why Murphy and Bailey were to be reduced in rank and given suspensions for conduct similar to that of plaintiffs suspended.

Able counsel for the various parties have in their briefs and oral arguments raised other serious questions as to the validity of the suspension and reduction in rank and discharge orders in their individual cases.

However, since there is a common defect in all the seventeen cases the Court does not feel that it will address those questions based upon the case of Olshack vs. The Village of Skokie, 541 Fed. 2nd 1254, a 1976 case. And the reason is heretofore enunciated herein.

This Court reverses the seventeen orders of suspension, discharge and suspension and discharge and reduction in rank.

The Court further orders those plaintiffs who were discharged reinstated as County employees.

The Court further orders that Adolphus Bailey and Leonard Murphy who were reduced in rank as well as suspended be reinstated to their former ranks.

With respect to the plaintiffs who were suspended since the suspensions have long been served the Court remands the matter back to the defendant Board to determine the amounts of back pay due those respective employees. Since this case represents a novel case in Illinois jurisdiction, in Illinois jurisprudence, the Court will stay its order of reinstatement and remandment for a determination of back pay for thirty days to give the defendant, public officials, and

opportunity to appeal and obtain a further stay from the Appellate Court. That will be my order.

MR. FOSTER: Thank you, your Honor.

MR. SAMUELS: Thank you.

THE COURT: Prepare your order. Why don't you type the order out.

MR. SAMUELS: My I address the Court on this matter; in the -- as counsel in the decision that you have rendered you made direct relationship to Lieutenant Bailey and Sergeant Murphy. Sergeant Smith was also reduced in rank, --

THE COURT: Let's make a direct quote for Sergeant Smith that he be returned to work.

MR. SAMUELS: And restored to his rank?

THE COURT: And restored to his rank. I didn't realize that I had overlooked that. And express my apologies for overlooking, -- he's too big.

MR. SAMUELS: He's too big to be overlooked. Thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause.)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

I, Gregory L. Armstrong, an Official Court Reporter for the Circuit Court of Cook County, County Department-Law Division, do hereby certify that I reported in stenotype the proceedings had at the hearing of the aforementioned cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable JAMES C. MURRAY, Judge of said Court.

_____
Official Court Reporter

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

ELIJAH MAGGETTE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 80 L 23710
	)	83 L 50166
COOK COUNTY POLICE AND CORRECTIONS MERIT BOARD, et. al.,	)	Consolidated
	)	
	)	
Defendants.	)	

JUDGMENT ORDER

This cause coming on for further hearing and disposition under the Administrative Review Law; and the Court having considered the Original and Supplemental Record of Proceedings, and the memoranda submitted by counsel for the respective parties; and having heard oral arguments and now being fully advised in the premises,

It is ordered that the Order of the Defendant, Merit Board entered December 13, 1982 (erroneously dated 1980), whereby it was ordered and adjudged that Plaintiff, Elijah

Maggette was guilty of the charges in the Sheriff's complaint filed with the Merit Board, and was separated from the Department of Corrections, be and the same is hereby reversed and set aside.

It is further ordered that this case is remanded to the Defendant, Merit Bord with instructions to reinstate Plaintiff, Elijah Maggette to his position as Correctional Officer in the Cook County Department of Corrections as of February 14, 1980 and to determine the amount of back salary due him from that date, to which he is entitled, to the end that he may be paid said amount and give full credit for seniority, longevity, pension and all other purposes from said date.

It is further ordered that Plaintiff have and recover costs from Defendants' in the sum of $144.50.

It is further ordered that enforcement of this order is stayed for 30 days.

This order is entered pursuant to Opinion of the Court rendered November 9, 1983.

ENTER: _____
JUDGE

Dated November _____, 1983

COOK COUNTY POLICE AND CORRECTIONS
MERIT BOARD, COOK COUNTY, ILLINOIS

IN THE MATTER OF:

Elijah Maggette)
) Docket No. 248
Correctional Officer)

O R D E R

WHEREAS this above entitled cause coming up in conformance and compliance with the remand order of the Honorable Judge James C. Murray and

WHEREAS the Merit Board did request and direct that counsel of the respective parties submit proposed findings of fact which would conform to the evidence presented at the subject's prior hearing and

WHEREAS the Merit Board, having given due consideration to all proposed finding of facts submitted, and after having reviewed the record of the proceedings and exhibits presented,

NOW THEREFORE, the Merit Board, being fully advised in the premises does hereby make findings of fact as follows:

1. That the respondent was absent from his assigned post and shift from January 21, 1980 to January 29, 1980 in violation of Article VIII, Sections B(4) and B(13) of the Rules and Regulations of this Board and in violation of General Order No. 78-13, Section II (B)(6) of the Department of Corrections.

2. That the respondent acted in concert with others to jeopardize the security of the Institution, in violation of Article VIII, Section B(4) and (10) in violation of General Order No. 78-13, Section B(5) and (12) of the Department of Corrections.

3. That the respondent failed to remain at home during a period of alleged illness, in violation of article VIII, Section B(4) of the Rules and Regulations of this Board and in violation of General Order No. 78-11, Section VI (E) (2) of the Department of Corrections.

4. That the respondent failed to furnish a doctor's verification of alleged illness, in

violation of Article VIII, Section B(4) of the Rules and Regulations of this Board, and in violation of General Order No 78-11, Section VI(E) (4), and the Emergency Procedures Memorandum dated January 18, 1980, paragraph 4, of the Department of Corrections.

5. That the respondent failed to return to work as ordered by the Circuit Court of Cook County, in violation of Article VIII, Section B(7) of the Rules and Regulations of this Board and in violation of General Order No. 78-13, Section B(11) of the Department of Corrections.

6. That the respondent failed to report to his assigned post and shift on January 29, 1980, as ordered by mailgram, in violation of Article VIII, Section B(7) and in violation of General Order 78-13, Section B(11) of the Department of Corrections.

ORDERED AND ADJUDGED that Elijah Maggette is guilty of the charges in the Sheriff's

complaint filed with the Merit Board and is hereby separated from the Department of Corrections.

Samuel W. Nolan

Robert A. Novelle

E. James Garbutt

Dated this 13th day of December, 1980

BEST AVAILABLE COPY

No. 85-263

Supreme Court, U.S.
FILED
OCT 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ELIJAH MAGGETTE,

Petitioner,

vs.

COOK COUNTY POLICE AND CORRECTIONS MERIT BOARD, ROBERT A. NOVELLE, SAMUEL W. NOLAN, E. JAMES GARBUTT, RICHARD J. ELROD, Sheriff of Cook County, and PHILIP T. HARDIMAN, Executive Director, COOK COUNTY DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether the discharge of the petitioner for participating in an illegal "blue flu" job action denied him rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

2.

Whether the selection of the petitioner for discipline denied him his equal protection rights guaranteed by the Fourteenth Amendment.

3.

Whether the discharge of the petitioner and only a few others of those disciplined denied him his equal protection rights guaranteed by the Fourteenth Amendment.

4.

Whether a question of fact is determinable by this Court.

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No. 85-263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ELIJAH MAGGETTE,

Petitioner,

vs.

COOK COUNTY POLICE AND CORRECTIONS MERIT BOARD, ROBERT A. NOVELLE, SAMUEL W. NOLAN, E. JAMES GARBUTT, RICHARD J. ELROD, Sheriff of Cook County, and PHILIP T. HARDIMAN, Executive Director, COOK COUNTY DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Cook County Police and Corrections Merit Board, Robert A. Novelle, Samuel W. Nolan, E. James Garbutt, Richard J. Elrod, Sheriff of Cook County, and Philip T. Hardiman, Executive Director, Cook County Department of Corrections, respectfully request that the Petition for a Writ of Certiorari be denied.

STATEMENT OF THE CASE

On January 20, 1980, jail guards at the Cook County Department of Corrections went on strike. The strike, which lasted for ten days, was characterized by a massive "call-in sick" campaign, which at times during this period involved 90% of the work force at the department.

The "work stoppage" created a public emergency, and necessitated the use of Forest Rangers, courtroom bailiffs, and others unschooled in correctional work to guard the inmates. (A.R. 586-587, 1225)

There had been warning that there would be a strike. At a meeting of the Cook County Board of Commissioners on January 16, 1980, large numbers of guards appeared demanding pay increases. Through statements made by some of the attending guards, their conduct, and a circular distributed which contained strike instructions, a work stoppage was plainly implicated if the guards' demands were not met. (A.R. 564-67, 2620) Petitioner Maggette attended this meeting. (A.R. 1045)

Acting upon this threat, Philip Hardiman, Executive Director of the Cook County Department of Corrections, prepared a memorandum outlining the procedures to be followed in the event of an emergency. This memorandum was received by the guards as they picked up their paychecks. It was also read at all roll calls on January 18, 19, and 20, 1980. (A.R. 581-84, 638)

Beginning with the morning shift on January 20, 1980, large numbers of guards began calling in sick. By the afternoon of January 20th, the situation had become so critical that Director Hardiman implemented his emergency plan. Petitioner called in sick on January 20th (A.R.

2627), but was observed on the picket line which suddenly appeared at the department on that date. (A.R. 1130) Most of the pickets, Petitioner excepted, wore ski-masks. The pickets carried signs demanding pay increases and shouted slogans.

At one point, during this picketing, Petitioner attempted to block a Sheriff's Investigator who was trying to speak with one of the other strikers. Petitioner shielded the other picket (Thomas White) with his body, threw out his arms, and exclaimed that Director Hardiman "would now have to deal with" Petitioner. (A.R. 1130-1131, 1148) Petitioner admitted being present on the picket lines possibly "more than twice." (A.R. 1050-1051)

Aside from the sick "call-ins," and the picketing (which continued through January 24th), there were almost nightly "labor rallies" at Operation P.U.S.H. headquarters. These meetings were presided over by the Rev. Jesse Jackson and were attended by between 50 and 400 guards each. Petitioner admitted attending at least five of these meetings, (A.R. 1050-1051), but explained his absence from work during the period of January 20 to January 30, 1980, by saying that he was sick. Petitioner offered no medical testimony or evidence at trial to support this assertion.

On January 24, 1980, Respondents secured a Temporary Restraining Order from Judge Joseph Wosik of the Circuit Court of Cook County, the effect of which was to order the striking guards to return to work. Petitioner was aware of this order, but failed to obey it. (A.R. 605, 610-611)

On January 26, 1980, Judge Wosik again ordered the guards to return to work, this time within 24 hours. Maggette was served with a copy of the restraining order, but again failed to return to work. (A.R. 617, 1149)

Meanwhile, on January 23, 1980, Sheriff Richard Elrod wrote a letter to Reverend Jackson offering "amnesty" to guards who returned to work within a reasonable time. On January 26, 1980, mailgrams were sent to all of the striking guards directing their return to work by January 29, 1980. (A.R. 619, 2660) Petitioner did not return to work on or before the date scheduled.

The record contains no testimony or evidence that the contents of the "amnesty" offer of January 23, 1980, was ever conveyed to Petitioner or relied upon by him, nor does it contain any explanation by Petitioner of why he ignored the mailgram which rescinded it.

On January 30, 1980, the striking jail guards returned *en masse*, Petitioner among them. (A.R. 636-637) Petitioner was not, however, permitted to resume his employment, but was notified that he was suspended pending a discharge hearing before the Cook County Police and Corrections Merit Board.

On April 23, 1980, Petitioner was found guilty of Contempt of Court by Judge Joseph Wosik for Petitioner's refusal to obey the Court's restraining orders. This judgment was never appealed. (A.R. 2662)

Discharge hearings were commenced before the Cook County Police and Corrections Merit Board against 34 guards of various ranks, races, and sexes. Fourteen of the cases were disposed of by trial, plea agreement or resignation while 20 guards (including Petitioner) who were represented by the same lawyer, were tried together.

Two of these were dismissed for insufficient evidence at the end of the Sheriff's case. The remainder were found guilty of all or some of the charges. Six, including Petitioner, were terminated. Three were demoted and suspended for six months. The remainder were suspended for six months.

Petitioner and all but one of the guards who were disciplined pursued Administrative Review to the Circuit Court of Cook County. The Circuit Court remanded the case to the Merit Board for additional findings of fact. After the additional findings were made, the Circuit Court reversed the Merit Board and ordered reinstatement of Petitioner and the others, holding that there had been a violation of the Equal Protection Clause of the Constitution of the United States.

Respondents then appealed to the Appellate Court of Illinois, First Judicial District, which ultimately, in an unpublished opinion, reversed the Circuit Court and reinstated the findings and orders of the Merit Board.

Petitioner then requested leave to appeal to the Supreme Court of Illinois, the denial of which has resulted in the filing of the instant Petition for Certiorari.

REASONS FOR DENYING THE WRIT

I.

DISCIPLINING THE PETITIONER FOR HIS PARTICIPATION IN AN ILLEGAL WORK STOPPAGE AND HIS VIOLATION OF WORK RULES DID NOT DEPRIVE HIM OF HIS RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Petitioner alleges that his punishment for taking an active part in an illegal work stoppage was a denial of the rights of free speech and equal protection guaranteed to him by the First and Fourteenth Amendments.

The Respondent contends that the acts for which the Petitioner was discharged did not constitute protected speech.

The Petitioner participated in a "blue-flu" job action over wages and benefits wherein some 970 of the 1,300 employees of the Cook County Department of Corrections attempted to shut down one of the largest jails in the country (4,200 inmates) from January 20 to January 30, 1980. (A.R. 585) The Petitioner was observed on a picket line outside the jail. (A.R. 1130) He attended five strike meetings during the time he was purportedly too sick to work. (A.R. 1051) He failed to obey two court injunctions ordering him to return to work. (A.R. 605, 610, 617, 1149) He failed to return to work on January 29, 1980, although ordered to do so by mailgram from the Department of Corrections. (A.R. 619, 636, 2660)

At the time of the illegal strike, public employees in Illinois had no inherent right to bargain collectively or to strike. *Board of Education v. Redding*, 32 Ill.2d 576, 207 N.E.2d 427 (1965). Under the new Illinois Public Labor Relations Act, P.A. 83-1012, effective July 1, 1984, some employees have a right to bargain collectively, but the Petitioner, as a security employee, still has no right to strike. Ch. 48, §1617(a), Ill. Rev. Stat. In deciding *Redding*, the Illinois Supreme Court relied on this court's opinions in *Hughes v. Superior Court of State of California, etc.*, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985 (1950); *International Brotherhood of Teamsters, etc., Local 309 v. Hanke*, 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995 (1950); and *Bakery & Pastry Drivers and Helpers Local 802 of Inter. Brotherhood of Teamsters v. Wohl*, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178 (1942). The *Redding* court held that the strike of [public] employees was illegal. Further, that court held that, while picketing has an ingredient of communication, the cases make it clear that it cannot be

dogmatically equated with constitutionally protected free speech, and aspects of picketing going beyond free speech may be subject to restrictive regulations. As this Court stated in *Hughes*, picketing is not beyond the control of a state if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. 79 S.Ct. 718, 721.

In participating in the job action, the Petitioner was acting contrary to the laws of Illinois. Consequently, his picketing in support of that job action was for an illegal object and not protected speech.

The Respondent respectfully asks, therefore, that the petition for certiorari be denied.

II.

PETITIONER HAS FAILED TO DEMONSTRATE EITHER THAT HIS SELECTION FOR DISCIPLINE FOR HIS CONDUCT IN AN ILLEGAL STRIKE WAS BASED UPON AN OVERTLY DISCRIMINATORY CLASSIFICATION, OR THAT HIS SELECTION BOTH HAD A DISCRIMINATORY EFFECT AND WAS MOTIVATED BY A DISCRIMINATORY PURPOSE.

This case originated as a complaint brought by the Sheriff of Cook County against Petitioner and 33 other Cook County Jail Guards before the Cook County Police and Corrections Merit Board.

The Cook County Police and Corrections Merit Board is an agency established by statute and given the exclusive authority to, *inter alia*, remove, demote, or suspend correctional officers (jail guards) at the Cook County Department of Corrections. Ill. Rev. Stat., 1984, Ch. 125, §§52, 61, 62.

Petitioner Elijah Maggette, following a lengthy hearing, was found to have violated the conditions of his employment in a number of particulars including being absent from his assigned post, acting in concert with others to jeopardize the security of the Institution, failing to return to work as ordered by the Court, and failing to return to work as ordered in the January 27, 1980, mailgram. In essence, Petitioner was discharged for calling in sick when he was not, for failing to follow orders from his superiors, for refusing to follow orders by the Court, and for engaging in an illegal strike.

Historically, Illinois has prohibited the strike as a permissible labor tool by public employees. *Board of Education v. Redding*, 32 Ill.2d 567, 207 N.E.2d 427 (1965); *Battle v. Civil Service Commission*, 78 Ill.App.3d 828, 396 N.E.2d 1321 (1st Dist. 1979).[1]

On administrative review before the Circuit Court of Cook County, in the Illinois Appellate Court, and again in his Petition For Leave To Appeal before the Supreme Court of Illinois, Petitioner placed his principal reliance upon two civil rights cases decided by the United States Court of Appeals for the Seventh Circuit: *Olshock v. Village of Skokie*, 541 F.2d 1254 (7th Cir. 1976), and *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982).

It should be noted at this point that at no stage of the administrative or appellate proceedings in this case has Petitioner ever taken the position that he, as a public em-

[1] Since the disciplinary hearings in this case, Illinois has enacted a Public Employees Labor Relations Act. Ill. Rev. Stat., 1984, Ch. 48, §1601 *et seq.* Although some public employees are now permitted to strike, in certain limited situations, the Illinois Legislature has reiterated and given emphasis to the prior law which forbade strikes by police and corrections employees. Ill. Rev. Stat., 1984, Ch. 48, §§1617(a) and 1603(o).

ployee, had a constitutional right to engage in a strike which was prohibited by state law. This would be a difficult position to maintain since the Court's opinion in *Olshock*, upon which such heavy reliance has been placed by Petitioner, itself implicitly approved this Illinois practice. *Olshock v. Village of Skokie*, 541 F.2d 1254 at 1256, n.1 (7th Cir. 1976).

Nevertheless, Petitioner's reliance upon *Olshock* and *Ciechon* is misplaced for a number of other reasons.

First, both *Olshock* and *Ciechon* were actions brought in federal court under 42 U.S.C. §1983. The issues were markedly different from the outset. In the instant case the Sheriff of Cook County brought a disciplinary action before a local administrative agency, seeking Petitioner's discharge. The issues in this case were whether or not Petitioner had committed certain wrongs which merited discipline up to and including the sanction of discharge. The Merit Board was statutorily created to hear cases brought by the sheriff against his employees, not to hear cases *against* the sheriff. The proper forum for the relief requested by Petitioner, assuming *arguendo* the correctness of his argument, was not the Merit Board, but rather would have been a civil rights action filed in federal court.[2]

Second, both *Olshock* and *Ciechon* are legally and factually inapposite. In *Olshock*, the court's holding was bottomed upon the fact that all of the plaintiffs in that

[2] Petitioner, together with most of the other disciplined correctional officers, did file a §1983 action entitled *White v. Elrod*, which was No. 80 C 1524 in the United States District Court for the Northern District of Illinois, Eastern Division. Petitioner was dismissed from this suit on July 17, 1981. No appeal was taken from this dismissal. The suit went to trial on the remaining officers and resulted in findings adverse to all of the correctional officers on June 28, 1985.

case had been guilty of *identical* conduct, but that some had been discharged while others were simply suspended. It is apparent from the opinion that the Court of Appeals was convinced that the Plaintiffs who had been discharged were being punished for exercising their right to counsel. In the instant case, all twenty of those guards who went to trial in Maggette's case were represented by counsel, yet some were dicharged, some demoted, some suspended, and two had the charges against them dismissed at the close of the Sheriff's case. (A.R. 1465) There is no evidence in the record which suggests that only those who retained counsel were selected for disciplinary action.

In *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982) the only difference apparent between the individual charged and the individual left unpunished was one of sex. Otherwise their culpability was *identical.*

Maggette attempts to fit himself into this category but his attempt must fail since the only "fact" he can produce in support of his position is that there were a large number of guards who went out on strike, yet only a small number were selected for discipline. He can show no selection on the basis of race, sex, religion, or even the legitimate exercise of the right to free speech. He merely keeps restating the figures and concludes that because all were not charged, his selection was based upon some invidious but unidentified classification.

Actually, several very valid reasons why Maggette was selected may be inferred from the record.

The first is that the quantum of proof against Maggette was greater than that against those who remained uncharged. For example, most of those who actively engaged in picketing at the department could not be readily identified because they wore ski masks. The case against them

would simply have consisted of the fact that they were absent from work. Maggette did not wear a ski mask and was on the picket line on a number of occasions. (A.R. 1050-1051)

Secondly, as noted by the Illinois Appellate Court in its opinion, the trial and dismissal of approximately 70% of the jail guards at the department would have debilitated it. (See: Petition, App. 9) A public emergency had already been created during the brief duration of the strike. It would have been senseless to take some 970 guards to trial with only a marginal chance of proving a case against most of them where the disposition of the 34 who were charged took nearly nine months, and the resources of the County had already been strained to the breaking point.

Thirdly, Maggette made himself a target by assuming a leadership role in the illegal strike. Although he now disputes this, the record is unambiguous on this point. Why else did Maggette invite the Director of the Cook County Department of Corrections to "deal with" him? (A.R. 1130-31, 1148)

This Court recently decided a case which bears certain persuasive similarities to the case at bar. In *Wayte v. United States*, ____ U.S. ____, 105 S.Ct. 1524 (1985), the Government's policy of "passive enforcement" was challenged. This Court, in holding the Government's policy to be constitutionally acceptable, noted that the petitioner was required to show both that the selection process "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte, supra,* 105 S.Ct. 1524 at 1531. In the case at bar, Petitioner has shown neither of these things. Rather, he seeks to establish invidious intent by reference to a *rejected* offer of proof. (Pet. 13-14)

Petitioner has not been candid with this Court in the way he has sought to present this "offer of proof." The witness to whom Petitioner refers, one Arthur L. Jones, was one of the officers tried with Maggette. Prior to the appearance of Jones on the witness stand, Assistant Director Robert Glotz had testified, it being understood that Glotz would be unavailable for testimony in rebuttal. He was not asked any questions regarding the alleged formulation of the "hit list" of "creeps" to which Petitioner now refers, yet Petitioner and the other charged guards sought to impeach his testimony with that of Jones and without ever having given Glotz the opportunity to explain, admit or deny the statements Jones sought to attribute to him. (A.R. 1566-1573) This bad faith conduct on the part of Petitioner and his cohorts resulted in the offer of proof being rejected for evidentiary reasons. (A.R. 1570) It was not rejected, as Petitioner implies because the Merit Board refused to hear the constitutional issue. The rejection of this offer of proof was *never* challenged by Petitioner on review.

In summary, Petitioner has failed to show that he was selected for discipline on the basis of an overtly discriminatory classification, and he has likewise failed to point to competent facts in the record which show that his selection for disciplinary action was motivated by a discriminatory purpose or that it had a discriminatory effect.

Accordingly, Respondents respectfully request that the Petition for Certiorari be denied.

III.

PETITIONER CANNOT ESTABLISH DISCRIMINATORY PUNISHMENT WHERE THE FACTS IN THE RECORD SHOW THAT HE WAS NOT SIMILARLY SITUATED WITH THE GUARDS WHO WERE NOT DISCHARGED.

Petitioner next seeks certiorari for what he seeks to characterize as "invidious discrimination . . . among the 16 (guards) who were punished." (Pet. 19) In doing so he again cites *Olshock v. Village of Skokie*, 541 F.2d 1254 (7th Cir. 1976). His reliance upon *Olshock* is misplaced in the context of this discriminatory punishment argument as it was in his argument that he was selectively prosecuted, and for most of the same reasons.

It must again be emphasized that the *Olshock* holding was based upon the fact that all of those charged had engaged in *identical* conduct. The *only* basis for differing punishments was an impermissible one, the exercise of the right to counsel.

In the instant case, Maggette's conduct was different in both kind and degree from that of his co-strikers.

For example, Maggette has not mentioned that only he and the five others who were discharged were found guilty of Contempt of Court for their refusal to obey Judge Wosik's orders. (A.R. 2662)

In each of the examples cited by Petitioner himself, the word "except" appears, followed by the facts which illustrate that the involvement of the other guards who were not so severely disciplined was not *identical* to Maggette's situation at all. (Pet. 18-19)

Moreover, none of the guards who were merely suspended or demoted attended five labor meetings to give "moral support" to the other strikers (A.R. 1050-1051, 1057), were on the picket line on possibly more than two

occasions, *and* invited the Director of the department to "deal" with them. This situation was unique to Maggette.

Although the Board's findings may have been similar to those against co-strikers Bradley and Bailey "except" for the finding regarding Petitioner's failure to stay at home during his alleged illness, the facts supporting those findings were radically different. For example, neither Bradley nor Bailey was observed picketing.

Thus, the degree of involvement on Petitioner's part which supported the findings of the Merit Board was much more extensive than was that of the guards who were not discharged.

In summary, Petitioner cannot support with facts in this record that legal theory which he urges upon this Court. Accordingly, Respondents respectfully request that Maggette's Petition for Writ of Certiorari be denied.

IV.

WHETHER THE PETIIONER WAS ENTITLED TO AMNESTY IS NOT A FEDERAL QUESTION FOR DECISION BY THIS COURT.

The Petitioner contends that the Appellate Court of Illinois erred in holding that he was not entitled to amnesty. (Pet. 27) The Respondent contends that the so-called amnesty offer, if it was ever valid, was withdrawn before the Petitioner acted upon it.

In the course of negotiations to get the jail guards back to work, a letter was written by the Sheriff to one Jesse Jackson, who purported to act on behalf of the guards. In that letter, the Sheriff stated that no disciplinary action would be taken, if the jail guards returned to work in a reasonable time. (Pet. 28) Subsequent to that letter, two injunctions were obtained, ordering the Petitioner to

return to work. (A.R. 605, 610, 617, 1149) In addition, he was sent a mailgram ordering him to report to his regular shift on January 29, 1980, or face disciplinary action. He did not report to work by that deadline. (A.R. 619, 636, 2660)

In *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 29 S.Ct. 220, 221 (1909), this Court stated:

> The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities, and privileges of Federal origin, specifically set up in the state court, and denied by the rulings and judgment of that court. Nor does this court sit to review the finding of facts made in the court, but accepts the finding of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court.

Whether the Petitioner qualified for amnesty is a question of fact, which this Court may not retry. *St. Louis, I.M.&S. R. Co. v. Taylor*, 210 U.S. 281, 28 S.Ct. 616, 618 (1908). The Respondents therefore request that the Petition for Certiorari be denied.

CONCLUSION

Respondents, Cook County Police and Corrections Merit Board, Robert A. Novelle, Samuel W. Nolan, E. James Garbutt, Richard J. Elrod, Sheriff of Cook County, and

Philip T. Hardiman, Executive Director, Cook County Department of Corrections, respectfully request that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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